Supreme Court, U. S.
FILED
JUN 27 1974
MICHAEL RODAK, JR., CLERK

NO. 73-1723

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
APPELLANT

V.

MICHAEL L. STONE, ET AL,
APPELLEES

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

DON GLADDEN
MARVIN COLLINS
702 Burk Burnett Bldg.
Fort Worth, Texas

June 27, 1974

I N D E X

Page

TABLE OF AUTHORITIES vi

STATEMENT 2

I. NATURE OF THE CASE 2

II. FACTS OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT AND AUTHORITIES 12

I. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE-JUDGE COURT BELOW BECAUSE THIS CASE IS INDISTINGUISHABLE FROM THE DECISION OF THIS COURT IN PHOENIX V. KOLODZIEJSKI 12

A. The Facts of Phoenix v. Kolodziejski are Closely Analogous to Those of the Case at Bar 12

B. The Judge Below Who Disagreed With This Court's Decision in Phoenix v. Kolodziejski Concurred in the Unanimous Judgment Below Because He Could Find No Basis for Distinguishing This Case From Phoenix v. Kolodziejski 16

C. In 1970 This Court Summarily Affirmed the Judgment of a Three-Judge District Court in Parish School Board of the Parish of St. Charles v. Stewart, Citing Phoenix v. Kolodziejski, on the Basis of Facts Closely Analogous to Those of the Case at Bar 17

II. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE-JUDGE COURT BELOW BECAUSE APPELLANT HAS NOT RAISED A SUBSTANTIAL BASIS FOR REVERSAL IN ITS JURISDICTIONAL STATEMENT 20

III. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE-JUDGE COURT BELOW BECAUSE THAT DECISION IS SO CLEARLY CORRECT THAT THERE IS NO POSSIBILITY THAT THIS COURT WOULD BE INDUCED TO REVERSE 31

A. The Texas Supreme Court has Upheld the Constitutionality of the Voting Classification Challenged in This Case in the Face of This Court's Decisions of Kramer v. Union Free School District and Phoenix v. Kolodziejski 31

B. The Challenged Provisions of Texas Law Are Not Entitled to a Presumption of Constitutionality 33

C. None of the Purported Purposes of the Texas Voting Classification Meet the Constitutional Standard Laid Down by This Court in Harper v. Virginia State Board of Elections 33

1. Texas has no right to encourage disclosure and rendition of taxable property by conditioning the right to vote upon such disclosure and rendition, because that purpose bears no relation to voter qualifications 34

2. Texas has no right to limit the franchise to those who will pay for the obligations assumed in the bond election because this purpose bears no relation to voter qualifications 34

3. Texas has no right to limit the franchise in bond elections to those who are primarily interested in the outcome of the election because this purpose bears no relation to voter qualifications 35

4. In deciding whether the Texas voter classification meets the constitutional standard of Harper v. Virginia State Board of Elections, the degree of discrimination is irrelevant 36

D. The Only Three Conceivable Purposes of the Texas Voting Classification Fail to Meet the Constitutional Standard Laid Down by This Court in Kramer v. Union Free School District 37

1. The interests of the state in encouraging its citizens to disclose and render for taxation some property, however little, is not a compelling state interest 38

2. The challenged Texas voting classification is not necessary to promote the state interest, if any, of encouraging each

citizen to disclose and render for taxation some of his property 39

3. The interest of the state in limiting the franchise to those who will pay for the obligations assumed in the election is not a compelling state interest 39

4. The classification challenged herein is not necessary to promote the state's interest, if any, of limiting the franchise to those who will pay for the obligations assumed in the election 40

5. The interest of the state in limiting the franchise to those who are primarily interested in the outcome of the election is not a compelling state interest .. 41

6. The challenged voting restrictions are not necessary to promote the state's interest, if any, of limiting the franchise to those who are primarily interested in the outcome of the election 42

E. The Clear Mandate of Kramer v. Union Free School District and the Three Cases Subsequently Based Upon It is That These Five Texas Provisions Are Unconstitutional 43

CONCLUSION 47

PRAYER 47

APPENDIX A: NEW YORK STATUTES INVOLVED IN KRAMER V. UNION FREE SCHOOL DISTRICT 49

APPENDIX B: LOUISIANA STATUTES INVOLVED IN CIPRIANO V. HOUMA 50

APPENDIX C: ARIZONA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PHOENIX V. KOLODZIEJSKI 53

APPENDIX D: LOUISIANA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PARISH SCHOOL BOARD OF THE PARISH OF ST. CHARLES V. STEWART 56

TABLE OF AUTHORITIES

CASES: Page

Associated Enterprises, Inc.v. Toltec Watershed Improvement District,410 U.S. 743 (1973).....7,27 28,44

Cipriano v. Houma, 395 U.S. 701 (1969)....7,9,11, 24,29,43,45

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)...8,9,21,22,23, 30,31,33,34,35,36,46

Kramer v. Union Free School District, 395 U.S. 621 (1969)....6,7,8,9,11,24,29,31,32, 33,37,42,43,44,45

Montgomery Independent School District v. Martin, 464 SW2d 638 (Tex. Supp. 1971).....8,23,31,32, 33,36,38,45

Parish School Board of the Parish of St. Charles v. Stewart..... 6,7,11, 19,20,24

Phoenix v. Kolodziejski, 399 U.S. 204 (1970).....2,5,6,8,9,11,12,13,14, 15,16,17,18,19,20,21,24, 25,26,27,28,29,31,44,45

Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973).....7,26,27, 28,29,44

TABLE OF AUTHORITIES

CASES: Page

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 91973) 28

Stewart v. Parish School Board of St. Charles Parish, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.S. 884 (1970) 10,17,18,19,20, 29,40,42,44,45

CONSTITUTIONAL PROVISIONS:

Constitution of Texas Tex. Const. Art. VI §3a (1955).....20

OTHER AUTHORITIES:

"The Property Tax in Texas Under State and Federal Law", 51 Texas L. Rev. 885 (1973) (Professor Yudof).....18,19

NO. 73-1723

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JOHN L. HILL, ATTORNEY GENERAL OF TEXAS,
APPELLANT

V.

MICHAEL L. STONE, ET AL,
APPELLEES

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

TO THE HONORABLE UNITED STATES SUPREME COURT:

Appellees Michael Stone, et al, move this Court to summarily affirm the judgment of the three-judge court below pursuant to Rule 16(1)(c), (d)

of the Rules of this Court. The unusual length of this Motion to Affirm is attributable to the desire of counsel to include herein all relevant material and argument necessary to a resolution of this case without further hearing, oral argument, or briefing.

STATEMENT

I. Nature of the Case

The judgment on March 25, 1974 of the three judge court below holding unconstitutional and enjoining the implementation of the herein challenged Texas provisions was stayed by this Court only to the extent of permitting the Attorney General to continue enforce the dual balloting procedures effectuated by him in 1969 as a "temporary measure" pending resolution of the constitutional issues involved in Phoenix v. Kolodziejski, 399 U. S. 204 (1970). (pp. 8, 11, AG Juris. State.).[1]

II. Facts of the Case

There are no disputed facts in this case. On April 11, 1972 the City of Fort Worth held a bond election. A $6.8 Million Library Bond issue and a $3.0 Million Transportation System Bond issue were submitted to the electorate in dual box election. (Stip. #22, 23, pp. 12d-17d, AG Juris. State.) The Transportation System bonds passed in the property

[1] For convenience of reference, all citations to the judgment and opinions below as well as facts stipulated by the parties in the Pre-Trial Order will be to the appropriate pages in the Jurisdictional Statement of the Texas Attorney General, cited hereafter as "p. ____, AG Juris. State.".

owner box and the non-property owner box. (Stip. #47, p. 29d, AG Juris. State.) Those bonds have long since been certified by the Attorney General and sold by the City of Fort Worth. (Stip. #48, pp. 29d, 30d, AG Juris. State.) The Library Bonds passed in the non-property owner box, passed in the aggregate majority of persons voting in both boxes, but failed in the property owner box. (Stip. #47, p. 29, AG Juris. State.)

The Attorney General, whose approval is a prerequisite to sale of any general obligation bonds in Texas, has continuously refused since 1969 to approve any bonds unless such bonds received a majority vote of the aggregate of property owners and non-property owners and a majority vote of property owners. (Stip. #24, p. 17d, AG Juris. State.) While everyone otherwise qualified is theoretically entitled to vote, property owners are given a veto.

The City considered the Library Bond issue to have failed. (Stip. #29, p. 22d, AG Juris. State.)

The decision to sell the bonds is a legislative decision resting with the governing body of the appropriate political subdivision. In this case, the City Council of the City of Fort Worth is vested with such discretion. (Stip. #10, pp. 5d, 6d, AG Juris. State.) However, in this case, there is absolutely no question how the council would exercise its discretion. They would sell the Library Bonds if they could. The following facts make that clear:

1. Unless the city had intended to sell such bonds it is absurd to believe that they would adopt an ordinance submitting the proposition to the voters and spend the money necessary to conduct a city-wide election on that proposition. (See Stip. #9, p. 5d, AG Juris. State.; Pl. Ex. B)

2. The City Council has in fact sold the bonds approved by a majority of the rendering property owners in Proposition 1 (Transportation System Bonds) which was submitted at the same time as Proposition 2 (Library Bonds). (Stip. #48, pp 29d, 30d, AG Juris. State.)

3. The City Council has stated in a motion adopted unanimously on April 17, 1972, that their legal discretion would be exercised in favor of the sale of the bonds if legal entanglements did not exist. (Stip. #28, pp. 21d, 22d, AG Juris, State.)

4. The City Council, the city attorney, and the mayor have stipulated that if the property rendition requirements did not exist, they would take the necessary steps to sell the Library Bonds as soon as possible. (Stip. #26, 26, 30, pp. 20d-22d, AG Juris. State.)[2]

Appellees, property owners and non-property owners who voted in that election, brought this suit challenging Texas provisions of law limiting the right to vote in bond elections to rendering property owners, and seeking to enjoin the Attorney General and the City from considering the property ownership requirements of Texas law in determining whether the bonds passed.

---

[2] There are a number of technical procedural steps the City would have to take as prerequisite to issuance and sale of the Library Bonds. An exhaustive list of these steps appears in Stipulation #19, pp. 26, 27, P-T. All city officials involved have stipulated that they would take all of such necessary steps. (Stip. #26, 27, 30, pp. 34-37, P-T)

SUMMARY OF ARGUMENT

I. PRIMARY INDISTINGUISHABLE DECISION OF THIS COURT.

In Phoenix v. Kolodziejski, 399 U. S. 204 (1970) this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers. There is no substantial distinction between that case and the case at bar. Both cases involve general obligation bond elections. While Phoenix, supra, involved restriction of the franchise to real property taxpayers, the case at bar involves restriction of the franchise to rendering property owners ("property" including personal property), but there is no rational distinction between Phoenix and the case at bar which can be made on that basis. Both Phoenix and the case at bar involve municipal improvements of general public interest such as parks, playgrounds, libraries, transporation systems, etc. In Phoenix, it was certain that more than half the debt service requirements on the bonds would be satisfied from revenues of the other local taxes paid by non-property owners. In the case at bar the testimony was the the general obligation bonds would be paid off solely from the proceeds of taxes of persons who own real and personal property. However, this Court in Phoenix, spoke directly to that issue stating that,

> "justification for restricting the franchise to the property owners seems to be the strongest in the case of municipality which, unlike Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient." [emphasis added], Phoenix, supra, at page 210

One of the district judges below who concurred in the result reached by the unanimous court below could find no way to distinguish Phoenix, supra. He stated in his opinion,

> "I deeply regret that I have been unable to find a legitimate way to distinguish the cases above cited. [Phoenix]." (Concurring opinion of Judge Brewster, p. 22 AG Juris. State.).

There is direct precedent for this court summarily affirming the decision of the court below in this case. In Parish School Board of the Parish of St. Charles v. Stewart, aff'g 310 F. Supp. 1172 (EDLa...1970), 400 U. S. 884 (1970), a three judge district court within the Fifth Circuit held that Louisiana provisions limiting the right to vote in general obligation bond elections to "property taxpayers" were unconstitutional. The term "property taxpayers" included those who paid tax on personal property. This Court affirmed in a memorandum opinion citing Phoenix, supra.

II. APPELLANT ATTORNEY GENERAL OFFERS NO ARGUMENT WHATSOEVER IN HIS JURISDICTIONAL STATEMENT THAT THE TEXAS CLASSIFICATORY SCHEME CHALLENGED IN THIS CASE MEETS THE COMPELLING STATE INTEREST TEST ANNOUNCED BY THIS COURT IN KRAMER V. UNION FREE SCHOOL DISTRICT, 395 U. S. 621 (1969) and PHOENIX V. KOLODZIEJSKI, 399 U. S. 204 (1970)

The argument contained in that jurisdictional statement is primarily based upon two contentions:

1. That this Court should apply the rational basis equal protection standard to the case at bar in spite of Phoenix, supra,;

2. That this Court's decisions in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U. S. 719 (1973) and Associated Enterprises, Inc. v. Tol-Tec Watershed Improvement District, 410 U. S. 743 (1973) are authority for this Court to uphold the constitutionality of the Texas classificatory scheme.

As to the first of such contentins it is respectfully submitted that this Court may apply the rational basis standard instead of compelling state interest test to the case at bar only if it is willing to overrule Kramer, supra, Cipriano v. Houma, 395 U. S. 701 (1969), Phoenix, supra, and Parish School Board of the Parish of St. Charles v. Stewart, supra.

As to the second contention it is respectfully submitted that neither Salyer nor Associated Enterprises offer a basis for upholding the constitutionality of the challenged Texas provisions. Neither of such cases involve bond elections. More fundamentally, however, both of those cases held in essence that when land is virtually the only thing affected by the outcome of an election, and the impact of the election on land alone is clear, then the franchise may be restricted to real property owners. The challenged Texas classificatory scheme in no way limits the franchise to persons primarily affected by the outcome of the election at bar. In what manner can it be said that the restriction of the franchise to rendering property owners restricts the franchise to persons primarily interested in the outcome of a library bond election? There is simply no manner, rational or irrational in which property ownership or rendition of property for taxation is related to the use of public library.

It is interesting to note that even though the Attorney General has suggested the propriety of this Court applying the rational basis standard rather than the compelling state interest test, he does not advance even one rational basis on which it can be said that non-rendering property owners or non-property owners should be disenfranchised by the State of Texas in bond elections involving issues of general concern to the community. Perhaps that failure on the part of the Attorney General is because there is no such rational basis.

III. THE DECISION OF THE COURT BELOW IS CLEARLY CORRECT.

The Texas Supreme Court in Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Sup. 1971) upheld the constitutionality of the voting classification challenged in this case in the face of this Court's decision in Phoenix, supra. The Texas Supreme Court avoided any meaningful attempt to apply the standards set down by this Court in Phoenix.

By virtue of this Court's decision in Kramer v. Union Free School District, supra, these challenged Texas provisions are not entitled to the general presuption of constitutionality afforded state laws.

This Court in Harper v. Virginia State Board of Elections, 383 U. S. 663 (1966), struck down the constitutionality of a poll tax in Virginia. Applying the rational basis standard, this Court held that,

> "wealth like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Harper, supra, at 668.

One of the avowed purposes of the Texas classificatory scheme - to encourage disclosure and rendition of taxable property - has no more relation to voter qualifications than does wealth, highway safety, or any number of other topics in which the state is otherwise legitimately concerned. Assuming arguendo that the Texas scheme somehow limits the franchise to those who will pay for the obligation assumed in the election, this does not prevent a voter from intelligently exercising his ballot. If it may be said for the purposes of argument that the classificatory scheme in this case somehow limits the franchise to those who are primarily interested in the outcome of the election this, too, is no justification since it does not render a voter incapable of casing an intelligent ballot. Both the opinion of the Texas Supreme Court and the jurisdictional statement of the Attorney General assert that the Texas classificatory scheme does not stop anyone from voting who really wishes to vote, since there in no minimum amount of property which a person may render, and he need not have paid the tax. That contention was answered emphatically in Harper, supra:

> "We say the same whether the citizen otherwised qualified to vote, has a dollar and fifty cents in his pocket or nothing at all, pays the fee or fails to pay it." 383 U. S. at 668.

This Court in Kramer v. Union Free School District, supra, Cipriano v. Houma, supra, and Phoenix v. Kolodziejski, supra, laid down the applicable tests to be applied in this case:

1. There must be a compelling state interest for the classification;

2. And the classification must be necessary to promote that compelling state interest.

Assuming for the sake of argument that the challenged classificatory scheme does somehow encourage citizens to disclose and render for taxation a token amount of property, rendition of a thirty cent pencil is something less than compelling. And this is all it takes to vote. Exclusion of a voter from the polls in a bond election is a clumsy and imprecise manner in which to collect taxes. There are other recognized, better methods to encourage rendition of taxable property. Thus, these challenged voting laws are not necessary to encourage citizens to render property for taxation.

Assuming arguendo that the classificatory scheme challenged here somehow limits the franchise to those who will pay for the obligations assumed in the election, this is not a compelling state interest. It disenfranchises multitudes of persons who are interested in such broad issues as a transportation system or libraries. The Court in Stewart v. Parish School Board of St. Charles Parish, 310 F. Supp. 1172 (1970), aff'd mem. 400 U. S. 884 (1970) held that the special interests of property taxpayers is not a compelling state interest. Moreover, there are many persons otherwise qualified to vote who have no property rendered for taxation in the year of the election, but who will render property and pay taxes in the future years. That money will be applied to the retirement of the bonds. Others will effectively pay property taxes in the form of rent or costs of goods sold.

Limiting the franchise to those who are primarily interested in the outcome of the election (if indeed this could be done) would not be a com-

pelling state interest for the reason that the voter not primarily interested in the outcome could nevertheless cast an intelligent informed ballot. However, that question is effectively pretermitted by recognition that no rational argument can be made that a requirement of rendition of property for taxation in any manner limits the franchise in a library bond election to the persons primarily interested in the outcome.

Kramer, supra, Cipriano, supra, Phoenix, supra, and Parish School Board of the Parish of St. Charles, supra, really do not leave even one significant question which this Court needs to answer about the constitutionality of Texas classificatory scheme. In Phoenix, this Court noted:

> "***Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners." Phoenix, supra, at page 212-213.

Texas is one of those fourteen states.

In the face of that decision the Texas Supreme Court has squarely held the voting scheme challenged herein unconstitutional.

Since virtually the complete record in this case is before the Court and all evidentary matters are undisputed, this Court should affirm on the merits without briefing, oral argument, or further hearing.

ARGUMENT AND AUTHORITIES

I. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE JUDGE COURT BELOW BECAUSE THIS CASE IS INDISTINGUISHABLE FROM THE DECISION OF THIS COURT IN PHOENIX V. KOLODZIEJSKI.

In Phoenix v. Kolodziejski, 399 U. S. 204 (1970), this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers.[3]

A. The Facts of Phoenix v. Kolodziejski are Closely Analagous to Those of the Case at Bar.

The five fundamental points of comparison between Phoenix, supra, and the case at bar demonstrate that there is no substantial distinction between the two cases.

1. Type of Election:

Both Phoenix, supra, and the case at bar involve bond elections.

2. Type of Property:

In Phoenix, supra, the franchise was limited to real property taxpayers, while in the case at bar the franchise is limited to owners of property which is rendered for taxation. The term "property" includes all types of property, real, personal or mixed. The distinction between real property and other types of

---

[3] See Appendix C for a full text of the Arizona provisions there held unconstitutional

property is important for many purposes, but certainly the lack of ownership or rendition of personal property constitutes no greater reason to deny the franchise to an otherwise qualified voter than does lack of ownership of real property.

3. Type of Bond:

Both Phoenix, supra, and the instant case involve general obligation bonds.

4. Purpose for Which Bond Money Is Spent:

In Phoenix, supra, the general obligation bonds were to be issued for the purpose of financing various municipal improvements, such as city sewer system, parks, playgrounds, police and public safety buildings, and libraries. In the case at bar it is undisputed that general obligation bonds can be used to finance almost any type of public facility. The two issues involved in the April 11, 1972, City of Fort Worth bond election were a $3 million transportation bond issue and a $6.8 million library bond issue. Clearly the bond issues involved in both instances affect virtually all of the citizens of the respective communities and would be of general interest to all. Phoenix, supra, held that the difference between the interests of property owners and the interests of non-property owners on issues such as

these is not great enough to justify excluding the non-property owners from voting. That holding is equally applicable to the case at bar.

5. Debt Service Requirements:

In Phoenix, supra, the stipulated facts established that it was anticipated that more than half the debt service requirement on the bonds at issue would be satisfied not from real property taxes, but from revenues of other local taxes paid by non-property owners as well as other local taxes paid by persons who own real property. In the case at bar the secretary of the City of Fort Worth testified by stipulation that the principal and interest on general obligation tax-supported bonds issued by the city would be paid solely from the proceeds derived from taxes levied, assessed, and collected from persons who own real, personal or mixed property which has been duly rendered for taxation. (Stip.# 42, pp. 25d, 26d, AG Juris. State.). Thus, there is a distinction between the two cases. However, this court spoke directly to just that distinction in Phoenix, supra, and made it clear that such a distinction would not change the result at all.

> "... the justification for restricting the franchise to the property owners seems to be strongest in the case of a municipality which, un-

like Phoenix, looks only to property tax revenues for servicing general obligation bonds. But even in such a case the justification would be insufficient. Property taxes may be paid intially by property owners, but a significant part of the burden of each year's tax on rental property will very likely be born by the tenant rather than the landlord since, as the parties also stipulated in this case, the landlord will treat the property tax as a business expense and normally will be able to pass all or a large part of this cost on to the tenants in the form of higher rent. Since most city residents not owning their own homes are leasees of dwelling units, virtually all residents share the burden of property taxes imposed and used to service general obligation bonds. Moreover, property taxes on commercial property, much of which is owned by corporations having no vote, will be treated as a cost of doing business and will normally be reflected in the prices of goods and services purchased by non-property owners and property owners alike." [Emphasis Added] Phoenix v. Kolodziejski, supra, at pages 210, 211.

Precisely the same situation obtains in the case of persons owning substantial personal or mixed property who pass the taxes on to consumers and other persons. The likelihood of passing on taxes to consumers in the case of personal property is perhaps stronger. In fact the proposition that property taxes are passed on through the sales of personal property and goods and services is specifically recognized in the above quotation from this Court's opinion in Phoenix, supra.

It is respectfully submitted that there is simply no substantial distinction between Phoenix, supra, and the case at bar.

B. The Judge Below Who Disagreed With This Court's Decision in Phoenix v. Kolodziejski Concurred in the Unanimous Judgment Below Because He Could Find No Basis For Distinguishing This Case From Phoenix v. Kolodziejski.

District Judge Brewster below, who concurred in the result reached by the three judge court, stated in his opinion:

"I relunctantly concur only in the judgment now being entered herein because I am unable to see a substantial distinction between this case on the one hand and City of Phoenix v. Kolodziejski, on the other. My oath of office binds me to follow the decisions of the Supreme Court of the United States, whether I agree with them or not. My own views regarding the constitutionality of restrictions on voting here involved are the same as those expressed in Kramer v.

Union Free School District, Dunn v. Blumstein, and the City of Phoenix v. Kolodziejski, supra,"[Emphasis Added], (Opinion of Judge Brewster, pp. 19a, 20a, AG Juris. State.).

Judge Brewster's final observation at the end of his opinion was as follows:

"I deeply regret that I have been unable to find a legitimate way to distinguish the cases above cited." (Concurring Opinion of Judge Brewster,p.22a, AG Juris. State.).

C. In 1970 This Court Summarily Affirmed the Judgment of a Three Judge District Court in Parish School Board of the Parish of St. Charles v. Stewart, Citing Phoenix v. Kolodziejski, on the Basis of Facts Closely Analogous to Those of the Case at Bar.

On February 25, 1970, a three judge district court within the Fifth Circuit held that Louisiana provisions restricting eligibility to vote in bond elections to property taxpayers violated the Equal Protection Clause. Stewart v. Parish School Board of the Parish of St. Charles.310 F. Supp. 1172 (EDLa....1970), aff'd mem. 400 U.S. 884 (1970). The Louisiana provisions there involved [4] required that political sub-divisions could issue bonds only if the bonds were approved by a majority in number and in amount of property of the taxpayers who voted in the election. While the requirement of approval by a majority in amount of property of the Louisiana voting classification is different from those involved in Phoenix.

---

[4] See Appendix D herein for full text of those provisions.

supra and in the case at bar, the argument for upholding the classification in Stewart, supra, would be stronger than the argument for upholding the classification in Phoenix, supra, or the case at bar. This is so because in Stewart, supra, there was some attempt to make the weight of each voter's vote proportional to his potential tax liability as the result of casting his vote. On the other hand in Phoenix, supra, and in the case at bar, once a voter is on the rolls in any amount, he is permitted to vote.

The three judge panel in Stewart, supra, recognized that the term "property" as used in the challenged Louisiana provisions included personal property, and thus specifically held that the distinction between personal and real property in bond election cases is of no signficance. Moreover, the Court there took judicial notice of the fact that in Louisiana few persons pay any personal property taxes, and that those do usually pay them based upon the value of their automobile. It was there noted that while Louisiana law does provide that all property in the state is subject to taxation, that the tax assessors in fact primarily place business, commercial, and corporate personal property (merchandise inventory) on the assessment rols. Stewart, supra, at page 1173, note 3.

The same observation has been made with respect to Texas by tax experts. It has been recognized that Texas is one of a declining number of states which provide that all property is taxable unless specifically exempted by the state constitution. Yudof, "The Property Tax in Texas Under State and Federal Law", 51 Texas L. Rev. 885 at 888 (1973). Professor Yudof observed in that article that

"the net effect is that laws of Texas give little indication of the true size of the tax base. In practice personal property is rarely included - except for automobiles, which some 400 districts tax." (Yudof, supra, at page 889.)

He further observes that mortgages, savings accounts, stocks, bonds, and the whole panoply of household goods and chattels are largely untouched by the property tax. Yudof, supra, at page 889, note 27.

On November 9, 1970, this court summarily affirmed the judgment in Stewart, supra, citing City of Phoenix v. Kolodziejski, 399 U. S. 204 (1970). Parish School Board of the Parish of St. Charles vs. Stewart, 400 U. S. 884 (1970). Thus this Court has had a specific occasion to determine whether requirement of ownership of personal property would be treated any differently than a requirement of real property ownership, and has held that there is no distinction.

II. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE JUDGE COURT BELOW BECAUSE APPELLANT HAS NOT RAISED A SUBSTANTIAL BASIS FOR REVERSAL IN ITS JURISDICTIONAL STATEMENT.

*(p.8) The Attorney General argues taht the issue involved in this case is important because more than one-fourth of all the states still base the right to vote in general bond elections on property ownership or taxation. In 1970, this Court specifically recognized the then remaining fourteen states which had such limitations. Phoenix v. Kolodziejski, 399 U.S. 204 at 213, note 11 (1970). The Louisiana constitutional provisions cited in that footnote have now been held unconstitutional by this Court in Parish School Board of the Parish of St. Charles v. Stewart, 400 U.S. 884 (1970), aff'g Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (EDLa....1970). Article 6, §3(a) of the Texas Constitution was also cited in that footnote and has been held unconstitutional by the District Court below. Thus there are no more than twelve remaining states which so limit the right to vote in bond elections.

(p.11) The Attorney General of Texas recognized the importance of the issue herein at least as early as 1969, since in that year the Attorney General adopted a dual box election procedure as a "temporary measure" for the purpose of insuring validity of bonds voted after that date. The Attorney General suggests that this temporary measure was adopted on the assumption that a fi-
(p.12) nal determination of Phoenix, supra, would put

---

*Note - Page numbers in the left-hand margin herein locate specific contentions in the Attorney General's Jurisdictional Statement to which the response is being made.

the question to rest. In spite of direct and positive language in the Phoenix decision to the contrary, the Attorney General chose to believe that Phoenix did not put the question to rest. This Court's opinion in Phoenix, in reference to the fourteen states listed in note 11 therein as restricting the franchise to property owners in bond elections, stated as follows:

> Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners." Phoenix, supra at 213.

Such language may not have been necessary to a decision of the Phoenix case, but the death knell for the challenged Texas provision was clearly sounded.

(p.12) While the Attorney General correctly states that the test applied by the District Court below was whether the challenged voter exclusions are "necessary to promote a compelling state interest", Judge Woodward's concurring opinion below makes it clear that there is another independent basis upon which the challenged provisions should be held unconstitutitonal, to-wit: the traditional rational basis equal protection test announced by this Court in Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966). On the basis of Harper, supra, Judge Woodward's concurring opinion provided:

> The ownership of property, like race, creed or color, has no relationship to one's ability to participate intelligently in the electoral processes, and a state may only limit the eligibility requirements of voters to those factors which would affect a citizen's ability to intelligently cast his vote." (Concurring Opinion of Judge Woodward below, p. 18a, AG Juris. State.).

Whether the compelling state interest test or the traditional rational basis test is employed therefore makes no difference as to the result which should be reached by this Court in the case at bar.

(p.13) The Attorney General suggests that it is immaterial to the right to vote in a bond election in Texas whether one's ownership of property be great or small. This contention is literally correct, if somewhat misleading. Ownership of property alone does not qualify anyone to vote in a bond election in Texas. Property ownership is a necessary but not a sufficient condition to voting. The voter must also have rendered at least a token amount of that property. Under Texas law, a multi-millionaire can render a ten-
(p.14) cent pencil for taxation and thereby become qualified to vote in a bond election. The Texas Attorney General suggests that this property ownership and rendition requirement is so petty, like the poll tax struck down by this Court in Harper v. Virginia State Board of Elections, supra, that it constitutes no impediment to anyone who really desires to vote. This requirement of Texas law is no more petty than the requirement of a poll tax under consideration in Harper v. Virginia State Board of Elections, supra. If the requirement is so petty as to be no impediment at all, how could that token ownership and rendition requirement be of any tax significance to a political sub-division of the State of Texas?

It may be assumed that there is some minimum value of property below which a tax assessor-collector would not render an item. Whether that value would be ten dollars, five dollars, or one cent is purely speculation. But, if there is such a minimum requirement, then this would be tantamount to saying that any citizen who desires

to vote must own and render at least that amount of property. This court forcefully and completely foreclosed the possibility of any such requirement in Harper v. Virginia State Board of Elections, supra:

> "We say the same whether the citizen otherwise qualified to vote, has a dollar fifty cents in his pocket or nothing at all, pays the fee or fails to pay it.***The degree of the discrimination is irrelevant." Harper, supra, 383 U.S. at 668 (1966).

The requirement of property ownership is confusing to many citizens who in daily life equate the term "property" with the term "real property". The Attorney General's dual box election procedure has added greatly to the confusion, and the lengthy explanations appearing in local newspapers in the City of Fort Worth prior to each bond election do nothing to clarify the situation in the minds of most voters. Many voters, upon realizing that there must be some complication requiring a two-column front page story attempting to explain who may vote, and where, must simply give up and decide not to vote. Virtually no voter can have guessed that the propery rendition requirement is merely a token requirement.

(p.15) The Texas Supreme Court in Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Supp. 1971), upheld the challenged voting classification in this case for the reason that, among others, "one who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden." Montgomery, supra, 464 S. W.2d at 638. The Texas Supreme Court is mis-

taken. These Texas laws do not encourage a citizen to assume his distributive share of the tax burden. A multi-millionaire who renders a ten-cent pencil for taxation may vote, but the tax on that item is hardly his distributive share of the tax burden.

(p.18) The Attorney General alleges that only property owners will ever be called upon to repay the bonded indebtedness. That allegation would be more correctly stated that only persons who are rendering property owners during the years the bonds are paid off, not at the time of the election, plus all those who pay indirect taxes by purchasing items or services from rendering property owners, will ever be called upon to repay the bonded indebtedness. That group would contain almost everyone alive at the time of the bond election whether they were permitted to vote or not, except for those persons who have expired awaiting the final resolution of this litigation.

(p.18) The Attorney General has suggested that it is rational for the Texas Election laws to exclude non-renderers in tax bond elections since such persons have no incentive to vote either cautiously or intelligently. Thus, the Attorney General seems to concede that these laws do not meet the compelling state interest test announced by Kramer v. Union Free School District, 395 U.S. 621 (1969), Cipriano v. Houma, 395 U.S. 701, (1969) Phoenix v. Kolodziejski, 399 U.S. 204 (1970), and Parish School Board of the Parish of St. Charles v. Stewart, 400 U.S. 884 (1970), aff'g 310 F. Supp. 1172 (EDLa....1970).

(p.18) The Attorney General also suggests that non-renderers have no reason to vote against any such tax proposal. However, it would appear that the following persons would conceivably have ample

reasons for voting against such proposals:

1. Any non-renderer who anticipates owning property in the future and becoming a renderer, since tax bonds take many years to pay off;
2. Persons who have rendered property for taxation, but who do not desire to have their right to vote based upon their rendition or non-rendition of property for taxation, or who may be unwilling to state that they have property rendered for the purpose of gaining access to the voting booth;
3. Citizens who have a direct interest and concern as to whether or not the particular item for which the bond election was being held is desirable.

In the instant case, 1132, of the 4880 non-renderers voting on the library bonds voted against that proposition. (Stip. #47, p. 29d, AG Juris. State.). There is no proof on this record that those 1132 non-renderers had "no reason" for voting against the proposition. It is reasonable to assume that such persons were, in fact, quite intelligent and realized that their vote would increase the tax burden upon themselves as well as all other citizens of the City of Fort Worth. Moreover, this Court noted in Phoenix, supra, that "... those persons excluded from the franchise have a great interest in approving or disapproving municipal improvements..." Phoenix, supra, 399 U. S. at 210 [Emphasis added].

(p.18) The Attorney General's assertion that the Texas Election laws create a minimum qualification requirement which serves to protect and enhance the electoral process is belied by his

failure to point out how the electoral process is protected or enhanced. What quality does a rendering property owner have which makes him uniquely qualified to determine whether the City of Fort Worth shall build a $6.8 million library?

(pp.20, 21,22) The Attorney General has suggested Salyer Land Co. v. Tulare Lake Basin Water Storage District, 419 U.S. 719 (1973) as authority for refusing to apply the compelling state interest test in the case at bar. That case is distinguishable in several fundamental ways from both the case at bar and Phoenix, supra. The Water Storage District involved in Salyer Land Co., supra, had as its primary purpose the acquisition, storage, and distribution of water for farming. The District had no other general services which it provided such as schools, housing, transportation, utilities, roads, or any other type of service ordinarily furnished or financed by a municipality. Therefore, the restriction of the franchise to land owners within the District had the effect of limiting the ballot to those persons primarily affected by the outcome of the election. In the case at bar, as well as in Phoenix, by no reach of the imagination can it be suggested that the property ownership requirement restricted the vote to persons primarily interested in the outcome of the election. No logic or experience indicates that only property owners have a significant interest in such things as libraries, parks, police and public safety buildings, playgrounds and sewer systems.

Moreover, in Salyer, supra, all the costs of the District's projects were assessed against the land in proportion to the benefits received. Just the opposite obtains in the case at bar. The Texas classification scheme in no way distributes the burden of taxation proportionately between those who receive the most and the least

benefit from the outcome of the election, or from the operation of the issue voted on in the election. In fact, it permits a rendering property owner to vote without ever paying any tax whatsoever. Neither failure to pay the tax nor tax delinquency has any disqualifying effect under Texas law. Thus, this Court in Salyer held that, by reason of the Water District's special limited purposes and its disproportionate effect upon the activities of land owners as a group, the statute there involved did not violate the Equal Protection Clause. Also, Salyer, supra, did not involve a bond election but rather involved the election of directors to the Board of Governors for the Water District.

(p.22, 23) The Attorney General suggests Associated Enterprises Inc. v. Toltec Watershed Improvement District, 410 U.S. 743 (1973), decided the same day as Salyer, supra, as a basis for this Court refusing to apply the compelling state interest test. That case is also clearly distinguishable from Phoenix, supra, and the case at bar, since, like Salyer, supra, it involved a special purpose district which had a disproportionate effect on landowner's as such within the district. The operation of the watershed district in that case was conducted through special projects, assessments being made on the land for any benefits received, and such assessments constituting a lien upon the land itself until paid. The persons primarily affected by the outcome of the election were clearly and easily identifiable. These same persons were also liable for payments in direct proportion to the benefit they received. This court held that the state could rationally give landowners the exclusive right to vote.

(p.23) The Attorney General has asserted that the only distinction between the non-landowner resident's relationship to the elections in Salyer and Associated Enterprises compared with the relationship of the non-rendering appellees to the tax bond election is the difference between a "special purpose district' and a special purpose bond election. That assertion of the Attorney General is demonstrably false. The classificatory schemes involved in Salyer and Associated Enterprises successfully identified and isolated those persons who were almost exclusively affected by the operations of the special purpose district, to-wit: landowners. If there were to be an analogy between Salyer amd Associated Enterprises and the case at bar, then the Texas classificatory scheme would have to somehow limit the franchise to those persons almost exclusively affected by the outcome of the bond election. It does not do so. There is simply no manner, rational or irrational, in which property ownership or rendition of property for taxation may be related to the use of a public library.

(p.23, 24) The Attorney General urges this Court's decision in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) as a basis for urging this Court to apply the traditional rational basis test in the case at bar, since this Court there decided to "restrain the expansion" of the fundamental rights analysis in equal protection cases. If use of the compelling state interest test in the case at bar constitutes an "expansion" of the analysis of this Court in Phoenix, supra, why has the Attorney General not suggested to this Court in what respect an application of that test herein would constitute an "expansion"? As pointed out above in Point I. A. above, there is simply no substantial distinction between Phoenix, supra, and the case at bar, and application of the

compelling state interest test to the case at bar could not conceivably be viewed as an "expansion" of the fundamental rights analysis. However, the failure of this Court to apply the compelling state interest test in the case at bar would overrule this Court's decisions in Phoenix, supra, Kramer, supra, Cipriano, supra, and Stewart, supra.

If the Attorney General is urging this Court to overrule those four cases, he should say so.

(p. 27) The Attorney General has asserted that Judge Thornberry, author of the memorandum opinion below, fails to consider that the general obligation tax bond election in Texas will have a direct and disproportionate effect on property owners. He cites Salyer, supra, as the authority for that proposition. Salyer, supra, simply is not analagous, since in that case virtually the only thing affected by the election was land. In general obligation tax bond elections, land and property is one of the least significant things affected. The most significant thing affected is people. Additionally, the Attorney General's analysis makes no allowance whatsoever for the indirect payment of taxes.

(p.27) The Attorney General has suggested that one of the important facts to this Court in Salyer, supra, was that lessees could bargain with their lessors for the franchise by proxy. Is the Attorney General suggesting that there is some provision in Texas law which permits voting by proxy in general obligation tax bond elections? If he is, he should cite the relevant provisions to this Court. Counsel for appellees have uncovered no such provisions.

(p.29) If the Attorney General desires for this Court to apply the rational basis test in deciding the case at bar, why does he not devote at least two paragraphs in his Jurisdictional Statement to discussing the rational basis test set forth in Harper under the facts of the instant case? It is respectfully submitted that his failure to do so is based upon his realization that even under the traditional rational basis test, these challenged Texas provisions would completely fail to pass constitutional muster. These restrictions have no relationship whatsoever to the intelligent use of the ballot. Judge Woodward below specifically based his concurrance upon Harper, supra, in which this Court struck down a poll tax under the rational basis standard for the reason that such tax bore no relationship to the intelligent use of the ballot. Neither does property ownership.

III. THIS COURT SHOULD SUMMARILY AFFIRM THE DECISION OF THE THREE JUDGE COURT BELOW BECAUSE THAT DECISION IS SO CLEARLY CORRECT THAT THERE IS NO POSSIBILITY THAT THIS COURT WOULD BE INDUCED TO REVERSE.

A. The Texas Supreme Court has Upheld the Constitutionality of the Voting Classification Challenged in This Case in the Face of This Court's Decisions of Kramer v. Union Free School District and Phoenix v. Kolodziejski.

In Montgomery Independent School District v. Martin, 464 S.W.2d 638 (Tex. Sup. 1971) the Texas Supreme Court held that the Texas laws being attacked in the present case are not violative of the Equal Protection Clause of the Fourteenth Amendment. The opinion of the Court does not analyze whether the voting classification bears any relation to voter qualifications,[5] nor does it analyze whether the voting classification is necessary to promote a compelling state interest,[6] which are the

---

[5]"But we must remember that the interest of the State, when it comes to voting is limited to the power to fix the qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process." Harper v. Virginia State Board of Elections, 383 U.S. 663 at 668 (1966).

[6]"Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School District, 395 U.S. 621 at 627 (1969).

applicable constitutional standards.[7] Two purposes of the voting classification are set forth in the opinion:

(1) to limit the franchise to those who will pay for the obligations assume in the election,[8] and

(2) to encourage disclosure and rendition of taxable property.[9]

---

[7]The tradtional "rational basis" standard is not applicable to this case, Kramer v. Union Free School District, 395 U.S. 621 at 628 (1969).

[8]"One who is willing to vote for and impose a tax on the property of another should be willing to assume his distributive share of the burden. ... To allow some property owners to vote in that kind of an election, and at the same time to permit them to avoid their fair share of the resulting obligation, would confer preferential rights. This would be a denial of equal protection to another segment of citizens." Montgomery Independent School District v. Martin, 464 S.W.2d 638 at 641, 642 (Tex. Sup. 1971).

[9]"In our opinion, the requirement that the voter in a general obligation bond election must get his property on the rolls is in the interest of sound government and affords equal treatment to all citizens. ... This is the manner in which the Texas Constitution, as approved by the entire citizenry of the State, provides inducement for those who wish to participate in the decision making process in a School District to assume their rightful portion of the burden they help to create.

Personal property such as stocks, bonds, cash, automobiles, and livestock furnishes a great deal of the State's taxable property. No class of property is so susceptible to concealment and escapte from taxation as personal property. ... There may be other means to reach personal property, but

The only other conceivable state interest arguably promoted by the classification is to limit the franchise to those who are primarily interested in the outcome of the election.

B. The Challenged Provisions of Texas Law are not Entitled to a Presumption of Constitutionality.

The clear mandate of Kramer v. Union Free School District, 395 U.S. 621 (1969) is that these challenged Texas provisions are not entitled to the general presumption of constitutionality afforded state laws.[10]

C. None of the Purported Purposes of the Texas Voting Classification Meet the Constitutional Standard Laid Down by This Court in Harper v. Virginia State Board of Elections.

The constitutional standard of Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) is best stated in the language of its opinion:

> "But we must remember that the interest of the State, when it comes to voting is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability

---

experience has shown that every means must be pressed into service if the obligations of government are to be spread equally." Montgomery Independent School District v. Martin, 464 S.W.2d 638 at 641 (Tex. Sup. 1971).

[10] Kramer v. Union Free School District, 395 U.S. 621 at 627, 628 (1969)

> to participate intelligently in the electoral process." Harper v. Virginia State Board of Elections, supra, 383 U.S. 668 (1966).

1. Texas has no right to encourage disclosure and rendition of taxable property by conditioning the right to vote upon such disclosure and rendition, because that purpose bears no relation to voter qualifications.

It is undoubted that a state has the right to encourage disclosure and rendition of taxable property, just as it has the right to promote highway safety by appropriate legislation. But this does not mean a state is free to withhold the right of its citizens to vote in order to enforce these goals.

In Harper v. Virginia State Board of Elections, supra, this Court held that a state does not have the right to impose a tax on the right to vote because "(v)oter qualifications have no relation to wealth nor to paying or not paying this or any other tax." 383 U.S. 666. Disclosure and rendition of taxable property has no more relation to voter qualifications than does wealth, highway safety, building codes, or any number of other topics in which the state is otherwise legitimately interested. A state simply is not free to clutter up the voting laws with requirements which have no relation to voter qualifications.

2. Texas has no right to limit the franchise to those who will pay for the obligations assumed in the bond election because this purpose bears no relation to voter qualifications.

The fact that a person may or may not have to pay the taxes which fund an issue on which he is voting may influence how he wishes to vote. But it has no bearing on his ability to intelligently participate in the electoral process. Therefore, this purpose also fails to meet the constitutional standard of Harper v. Virginia State Board of Elections, supra.

3. Texas has no right to limit the franchise in bond elections to those who are primarily interested in the outcome of the election because this purpose bears no relation to voter qualifications.

Assuming arguendo that the challenged voting classification does somehow roughly limit the franchise to those primarily interested in the outcome of an election, that purpose bears only a speculative relationship to the ability or potential of a person to exercise his franchise intelligently. It may be generally true that persons primarily interested in the outcome of an election exercise more care in the casting of their vote, but this certainly does not mean that persons no primarily interested are incapable of exercising their franchise intelligently. For example, a Fort Worth resident voting in a statewide election on a proposition to abolish a hospital district in Waco certainly is "one not primarily interested in the outcome" of such election. But this in no way implies that the voter is incapable of casting an informed, intelligent ballot.[11]

---

[11]The State law which requires a statewide election in such cases is anamolous. Perhaps the Fort Worth resident shouldn't have a vote on such a proposition. But that is because he doesn't reside in or come under the control of such hospital district, and not because he is incapable of casting an intelligent ballot.

4. In deciding whether the Texas voter classification meets the constitutional standard of Harper v. Virginia State Board of Elections, the degree of discrimination is irrelevant.

The Texas Supreme Court has stated that the challenged voting scheme is no impediment to anyone who really wants to vote.[12] This argument was emphatically answered in Harper v. Virginia State Board of Elections, supra:

> "We say the same whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." 383 U.S. 668.[13]

---

[12]"It is the contention of the Attorney General, and we agree, that voter qualifications of ownership under the Texas constitutional and statutory provisions stated above, as interpreted by our decisions, are so universal as to constitute no impediment to any elector who really desires to vote in a bond election. A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax." Montgomery Independent School District v. Martin. 464 S.W.2d 638 at 640 (Tex. Sup. 1971).

[13]"To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant." Harper v. Virginia State Board of Elections, supra, 383 U.S. 668 (1966).

D. The Only Three Conceivable Purposes of the Texas Voting Classification Fail to Meet the Constitutional Standard Laid Down by This Court in Kramer v. Union Free School District.

This Court announced a strict standard for measuring state action in elections in Kramer v. Union Free School District:

> "(I)f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." Kramer v. Union Free School District, 395 U.S. 621 at 627 (1969).

It should be observed that this standard has two distinct requirements:

(1) there must be a compelling state interest for the classification; and

(2) the classification must be necessary to promote that compelling state interest.

Thus, in order to decide whether or not these five Texas provisions are consistent with the Equal Protection Clause of the Fourteenth Amendment, we must answer one or both of the following questions:

(1) is there a compelling state interest for the classifications made by these five provisions?

(2) even if there is, is the classification adopted necessary to promote that compelling state interest?

1. The interests of the state in encouraging its citizens to disclose and render for taxation some property, however little, is not a compelling state interest.

It is perfectly clear that the challenged Texas provisions do not require the voter to assume his pro rata share of the tax burden in order to vote.

> A voter is qualified if he renders any kind of property of any value, and he need not have actually paid the tax. Montgomery Independent School District v. Martin, 464 S.W. 2d 638 at 640 (Tex. Sup. 1971).[14]

---

[14] There is however some language in the same opinion indicating that the challenged provisions do encourage each citizen to assume his fair sahre of the tax burden.

> "To disclose one's share of the total burden for which he is responsible in a bond election requires no more than the law universally expects. To allow some property owners to vote in that kind of an election, and at the same time permit them to avoid their fair share of the resulting obligation, would confer perferential rights." 464 S.W.2d 641, 642.

This language cannot be reconciled with the language of the Court in that case quoted in the text.

The interest of the State in securing disclosure and rendition for tax purposes of a thirty-cent pencil is something less than compelling. The cost of accounting for such an item probably exceeds the tax that can be collected.

2. The challenged Texas voting classification is not necessary to promote the state interest, if any, of encouraging each citizen to disclose and render for taxation some of his property.

A law which exacts a monetary penalty for failure to render property for taxation is an appropriate and recognized technique for collecting taxes. Employment of a tax-collector assessor to discover and render taxable property is another recognized way to collect taxes. Both of these means are tailored to the end sought to be accomplished. Voting laws are not designed primarily to collect taxes, but are designed to give the citizen a voice in his government. Since there are other, better ways to encourage rendition of taxable property, these voting laws are certainly not necessary to promote that goal.

It is difficult to assess how many persons who otherwise would not render some property for taxation are persuaded to render taxable property by these Texas laws. The number of such persons is probably not very great. There are surely many more persons whose uncertainty over the property rendition requirements keeps them from the polls. Since these voting laws largely fail to encourage rendition of taxable property, they are not necessary to promote that goal.

3. The interest of the state in limiting the franchise to those who will pay for the obligations assumed in the election is not a compelling state interest.

The five Texas provisions attacked in this suit disenfranchise many voters who are directly affected by the results of the elections which are held pursuant to the challenged provisions. The bond election held on April 11, 1972, was for the purpose of submitting two propositions to the electorate:

Proposition 1 ..... $ 3,000.000
(Transportation System Bonds)

Proposition 2 ..... $ 6,860,000
(Library Bonds)

Certainly there is no compelling reason to adopt a classification which keeps otherwise qualified voters from voting on matters such as these. Each of these improvements vitally affects all the residents of Fort Worth. Most bond elections do affect all residents. Thus, while the Constitution and Statutes of Texas attempt to enfranchise only a limited class of voters in this type of election, it in no way limits the subject matter of the elections to matters concerning only those allowed to vote.

It is true that those who must pay the taxes for the improvements do have a special interest apart from the general public, but the Court in Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.W. 884 (1970) held that the special interests of property taxpayers is not a compelling state interest. 310 F. Supp. at 1181.

4. The classification challenged herein is not necessary to promote the state's interest, if any, of limiting the franchise to those who will pay for the obligations assumed in the election.

The Texas provisions disenfranchise many persons who will have to pay for the improvements voted on. There are many persons otherwise qualified to vote who will not have rendered property for taxation in the year of the election, but who will render property in future years. The tax on that property will be applied to the retirement of the bonds. There are other people who will effectively pay property tax in the form of rent, or overhead added to a seller's cost of goods sold. There are still others who will be deterred from voting because although they have rendered some property, they do not understand that these provisions of Texas law require only token rendition of taxable property as a condition to the right to vote.

The voting laws is no place to require token compliance with the legitimate objective of tax collection, and it is certainly no place for such token compliance when, as here, the law limits the right to vote in an imprecise and easily misunderstood fashion.

Clearly, there is a large amount of overkill in these provisions. These provisions are not necessary to promote the state interest of limiting the vote to those who will, in the long run, pay for the obligations. Indeed, these provisions do not even reasonably promote that interest.

5. The interest of the state in limiting the franchise to those who are primarily interested in the outcome of the election is not a compelling state interest.

Even though there is no hint that the challenged voting classification even begings to limit the franchise to those primarily interested

in the outcome of the election, such a purpose is not a compelling one.

This is the same state interest suggested in Kramer v. Union Free School District, supra, and this Court there held that the New York statute was not necessary to promote that interest since many persons vitally interested in the issues voted on were disenfranchised. 395 U.S. 632, 633.

The Court in Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970), aff'd mem. 400 U.S. 884 (1970), held that the special interests of property taxpayers is not a compelling state interest. 310 F. Supp. 1181.

The challenged Texas provisions suffer precisely the same infirmity, since the bond elections governed by the five Texas provisions are of vital concern to all voters. These bonds can be used to finance virtually any governmental function.

6. The challenged voting restrictions are not necessary to promote the state's interest, if any, of limiting the franchise to those who are primarily interested in the outcome of the election.

It is difficult to even make an argument that the challenged voting classification limits the franchise, even imprecisely, to persons who are primarily interested in the outcome of the election. Under the facts of the present case, a person who has no property rendered for taxation may have children who would be benefited to a great extent by the building of a new library or the improvement of existing facilities. And as has already been pointed out, even though this voter may have no property rendered for taxation, if he pays rent on his house or any other property which is taxable

in Texas, he is in effect paying the tax without having any property rendered. Indeed, by paying the tax he has done more to fulfill the state's objective of tax collection than a person meeting the minimum requirement for voting in a bond election. A renderer need not have paid any tax in order to vote. To say that a person is less interested, or is not primarily interested, in the outcome of an election such as the one held in this case simply is not true. The further difficulty with such an argument is that any attempt to decide by whatever means who is "primarily interested" in the outcome of an election for something of as much general interest as a library is necessarily highly subjective and speculative.

It is respectfully suggested that the challenged voting classification is not necessary to limit the franchise to persons primarily interested in the outcome of the election. Indeed, it doesn't even begin to so limit the franchise.

E. The Clear Mandate of Kramer v. Union Free School District and the Three Cases Subsequently Based Upon It is That These Five Texas Provisions Are Unconstitutional.

In Kramer v. Union Free School District, supra, this Court struck down a provision of the New York Education law which required a voter in school board elections to be either a parent of a child attending school in the district, or the owner or lessee of real property, or the spouse of an owner or lessee.[15]

In Cipriano v. City of Houma, 395 U.S. 701 (1969), a companion

[15]See Appendix A for a full text of the statute.

case to Kramer v. Union Free School District, this Court held unconstitutional a Louisiana statute which limited the right to vote in utility revenue bond elections to "property owners".[16]

In Phoenix v. Kolodziejski, 399 U.S. 204 (1970) this Court held unconstitutional Arizona statutes and constitutional provisions which limited the right to vote in general obligation bond elections to real property taxpayers.[17]

In Stewart v. Parish School Board of St. Charles, 310 F. Supp. 1172 (1970) aff'd mem., 400 U.S. 884 (1970), a three-judge district court withing the Fifth Circuit held that Louisiana constitutional and statutory provisions limiting the right to vote in general obligation bond elections to "property taxpayers" were unconstitutional.[18] The term "property taxpayers" included those who pay tax on personal property. This Court affirmed the judgment of the three-judge court in a memorandum opinion, citing Phoenix v. Kolodziejski, supra.

The Kramer doctrine has been applied by the Federal Courts in every subsequent case where the issue of restriction of the franchise in bond elections to property taxpayers has been raised.[19]

[16]See Appendix B for a full text of this Louisiana statute.

[17]See Appendix C for a full text of the Arizona provisions.

[18]See Appendix D for a full text of these provisions.

[19]Neither Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973) nor Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410

Without fail, the Courts have held the challenged state provisions unconstitutional. It will be necessary for this Court to overrule Kramer, Phoenix, Cipriano, and Stewart, supra, if these Texas provisions are to be held constitutional.

On June 23, 1970, this Court announced its decision in Phoenix v. Kolodziejski, 399 U.S. 204 (1970). This Court there held that a 1969 bond election in which the franchise was reserved to property owners was void. Issuance of those bonds was enjoined. In that opinion, this Court stated:

> "***Nor have we been shown that the fourteen states now restricting the franchise have unique problems that make it necessary to limit the vote to property owners." Phoenix v. Kolodziejski, 399 U.S. 212-213 (1970).

Texas is one of those fourteen states.

In the face of the Phoenix decision, the Texas Supreme Court has squarely held that the Texas voting scheme challenged in this suit is not violative of the Equal Protection Clause of the Fourteenth Amendment. Montgomery Independent School District v. Martin, 404 S.W.2d 638 (Tex. Sup. 1971).

U.S. 743 (1973) involved bond elections. More fundamentally, both of such cases basically held that when land is virtually the only thing affected by an election, and the impact of the election on land alone is clear, then the franchise may be restricted to real property owners. See II above pp. 26-28.

Since virtually the complete record in this case is before the Court and all evidentiary matters are undisputed, this Court should affirm on the merits without briefing, oral argument, or further hearing.

> "For to repeat, wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened and conditioned." Harper v. Virginia State Board of Elections, 383 U.S. 663 at 670 (1966).

CONCLUSION

Therefore, the Texas classificatory scheme limiting the right to vote in general obligation bond elections to rendering property owners is unconstitutional.

PRAYER

Wherefore, Appellees pray as follows:

1. That this Court decide the case without briefing, oral argument, or further hearing, and,

2. That this Court affirm the judgment of the three judge district court below.

RESPECTFULLY SUBMITTED,

LAW OFFICES OF DON GLADDEN
702 Burk Burnett Building
Fort Worth, Texas 76102

BY: _____
DON GLADDEN

_____
MARVIN COLLINS

PROOF OF SERVICE

The undersigned, a member of the Bar of this Court, hereby certifies that a copy of the foregoing Motion has this the 26th day of April, 1974, been served upon each counsel of record for appellees, in accordance with Rule 33 of this Court, by depositing the same in a United States mail box, with first class postage prepaid, addressed to said counsel at their post office addresses.

_____
DON GLADDEN

APPENDIX A: NEW YORK STATUTES INVOLVED IN KRAMER V. UNION FREE SCHOOL DISTRICT

1. Section 2012, New York Election Law.

A person shall be entitled to vote at any school meeting for the election of school district officers, and upon all other matters which may be brought before such meeting, who is: 1. A citizen of the United States. 2. Twenty-one years of age. 3. A resident within the district for a period of thirty days next preceding the meeting at which he offers to vote; and who in addition thereto possesses one of the following three qualifications:

(a) Owns or is the spouse of an owner, leases, hires, or is in the possession under a contract of purchase or is the spouse of one who leases, hires or is in possession under a contract of purchase of, real property in such district liable to taxation for school purposes, but the occupation of real property by a person as a lodger or boarder shall not entitle such person to vote, or

(b) Is the parent of a child of school age, provided such a child shall have attended the district school in the district in which the meeting is held for a period of at least eight weeks during the year preceding such school meeting, or

(c) Not being the parent, has permanently residing with him a child of school age who shall have attended the district school for a period of at least eight weeks during the year preceding such meeting. No person shall be deemed to be ineligible to vote at any such meeting, by reason of sex, who has the other qualifications required by this section.

APPENDIX B: LOUISIANA STATUTES INVOLVED IN CIPRIANO V. HOUMA

1. Article 39: 501 LA. STAT. ANN.

Elections. Except as otherwise provided in special cases, no subdivision may incur any debt, issue any bonds, levy any special tax, or assume any indebtedness unless it has been authorized by vote of a majority in number and amount of the property taxpayers qualified to vote under the constitution and laws of this state who vote at an election hereunder. The governing authority of any subdivision may call a special election for any of these purposes at any time; and it shall call an election for any of these purposes when requested so to do by the petition in writing of one-fourth of the property taxpayers eligible to vote at the election.

2. See Also
Article 33: 4258 LA. STAT. ANN.

Election to authorize the issuance of bonds; validation. Before the resolution authorizing the issuance of bonds under this Subpart is adopted by the governing body, the question of the issuance of the bonds shall be submitted and approved at either a special or general election which shall be ordered, conducted and canvassed in accordance with either of the following election procedures, at the discretion of the governing body;

(1). The question of the issuance of the bonds may be submitted to and approved by votes of a majority in number and amount of the property taxpayers who vote at an election held hereunder. In the event the governing body elects to order a property taxpayers' election, all matters pertaining thereto, including the qualifications of voters and the manner of calling and conducting the election

and canvassing and promulgating the results thereof shall be governed by the provisions of Chapter 4, Subtitle II, Title 39.

(2). The question of the issuance of the bonds may be submitted to and approved by a majority of the qualified electors of the municipal corporation who vote at an election held therein substantially in accordance with the general election laws of the state of Louisiana except that the election shall be ordered, conducted, canvassed and notice thereof published by the governing body in accordance with the procedures set forth in Chapter 4, Subtitle II, Title 39, except where inconsistent with the provisions of this section. In the event the governing body elects to order such an election, all qualified resident electors shall be entitled to vote in the election and voters shall not be required to sign a ballot. Voting machines shall be used in the holding of this type of election and assessed valuation shall not be voted in the election.

In the event a property taxpayers' election has heretofore been held and promulgated approving the issuance of bonds under this Subpart, as contemplated in Subparagraph (1) above, the governing body may proceed with the issuance and sale of such bonds without complying with the provisions of this section and without any further election approval.

All bonds heretofore issued under the provisions of this Subpart are hereby validated, ratified and confirmed and declared to be valid and binding obligations of the municipal corporation in accordance with the terms of their issuance in spite of any one or more irregularities which may have occurred in the passage of this Subpart or question which might be raised as to the constitutionality of any procedural provision of this Subpart. All proceedings heretofore had in connection with the

issuance of such bonds are hereby ratified, validated and confirmed.

3. See Also
Article 39.508 LA. STAT. ANN.

Qualifications of voters. Only property taxpayers qualified as electors under the constitution and laws of this state are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy.

With reference to Part IV of this Chapter if the limits and boundaries of any municipal corporation has been extended and the assessment roll that is to include the property in the extended limits has not already been made for the municipal corporation, those who have become property taxpayers by the extension of the limits and who are otherwise qualified to vote shall be permitted to vote in the election and the assessed valuation of their property shall be ascertained by reference to the last assessment roll of the parish.

APPENDIX C: ARIZONA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PHOENIX V. KOLODZIEJSKI

1. Article 7, Section 13 ARIZ. CONST.

Submission of questions upon bond issues or special assessments.

Questions upon bond issues or special assessments shall be submitted to the vote of real property taxpayers, who shall also in all respects be qualified electors of this State, and of the political subdivisions thereof affected by such question.

2. Article 9, Section 8 ARIZ. CONST.

Local debt limits; assent of taxpayers. No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding four per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of a majority of the property taxpayers, who must also in all respects be qualified electors, therein voting at an election provided by law to be held for that purpose, the value of the taxable property therein to be ascertained by the last assessment for State and county purposes, previous to incurring such indebtedness; except, that in incorporated cities and towns assessments shall be taken from the last assessment for city or town pruposes; Provided, that under no circumstances shall any county or school district become indebted to an amount exceeding ten per centum of such taxable property, as shown by the last assessment roll thereof; and Provided further, that any incorporated city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding fifteen per centum additional, for supplying such

city or town with water, artificial light, or sewers, when the works for supplying such water, light, or sewers are or shall be owned and controlled by the municipality.

3. Section 9-523 ARIZ. STAT. ANN.

Bond election. Questions on bond issues under this article shall be submitted to the qualified electors of the municipality. No bonds shall be issued without the assent of a majority of the qualified electors voting at an election held for that purpose as provided in this article.

4. Section 35-452 ARIZ. STAT. ANN.

Election to authorize indebtedness; qualifications of electors.

A. The governing body or board of a political subdivision enumerated in Section 35-451 may, and upon petition signed by fifteen per cent of its real property taxpayers who are qualified electors thereof shall, order an election by such taxpayers and electors to determine whether such indebtedness shall be authorized.

B. The order for the election in a school district shall be made by the board of supervisors in the county where such election will be held, either upon petition or upon request of the board of school trustees.

C. If a majority of the real property taxpayers who are qualified electors voting at the election vote in favor of creating an indebtedness in an amount exceeding four per cent of the value of the taxable property of the political subdivision, such political subdivision may become so indebted.

5. Section 35-455 ARIZ. STAT. ANN.

Issuance and sale of bonds; call for election.

A. When the political subdivision designated in this article desires to issue bonds or other evidences of indebtedness, the governing body or board thereof may, with assent of a majority of the real property taxpayers who are qualified electors therein voting at the election held as provided by Section 35-454, issue and sell bonds in the amount authorized at the election.

B. The call for the election shall set forth the amount of each bond and the aggregate amount of the bonds, the maximum rate of interest to be paid thereon, when the interest is payable, the number of years such bonds or any series thereof are to run from the date of such bonds or series and the purposes for which the money derived from the sale of the bonds will be expended.

APPENDIX D: LOUISIANA STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN PARISH SCHOOL BOARD OF THE PARISH OF ST. CHARLES V. STEWART

1. Article 14, Section 14a LA. CONST.

Municipal corporations, parishes and school, road, subroad, sewerage, drainage, subdrainage (waterworks and sub-waterworks) districts, hereinafter referred to as subdivisions of the State may incur debt and issue negotiable bonds, when authorized by a vote of a majority in number and amount, of the property taxpayers qualified to vote under the Constitution and laws of this State, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to retire said bonds at maturity.

2. Article 39-508, LA. STAT. ANN.

Qualifications of voters. Only property taxpayers qualified as electors under the constitution and laws of this state are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy.

With reference to Part IV of this Chapter if the limits and boundaries of any municipal corporation have been extended and the assessment roll that is

to include the property in the extended limits has not already been made for the municipal corporation, those who have become property taxpayers by the extension of the limits and who are otherwise qualified to vote shall be permitted to vote in the election and the assessed valuation of their property shall be ascertained by reference to the last assessment roll of the parish.